

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS
No. 19-140V
(to be published)

DANA CHAMBERS, *
*
Petitioner, * Chief Special Master Corcoran
*
v. * Filed: October 26, 2022
*
SECRETARY OF HEALTH *
AND HUMAN SERVICES, *
*
Respondent. *

Andrew D. Downing, Downing, Allison, & Jorgenson, Phoenix, AZ, Petitioner.

Terrence K. Mangan, Jr., U.S. Dep’t of Justice, Washington, DC, Respondent.

DECISION GRANTING IN PART MOTION FOR ATTORNEY’S FEES AND COSTS¹

On January 28, 2019, Dana Chambers filed a petition seeking compensation under the National Vaccine Injury Compensation Program (“Vaccine Program”).² Petitioner alleged that she developed Undifferentiated Connective Tissue Disease (“UCTD”), as a result of the seasonal influenza (“flu”) vaccine and the Tetanus, Diphtheria, and Pertussis (“Tdap”) booster she received on October 7, 2016. Petition (ECF No. 1) at 1–13. After the hearing, a decision denying entitlement was entered on July 22, 2022. ECF No. 75 (“Decision”). No appeal of the Decision was taken.

¹ Because this Decision contains a reasoned explanation for my actions in this case, it must be posted on the United States Court of Federal Claims website, in accordance with the E-Government Act of 2002, 44 U.S.C. § 3501 (2012). As provided by 42 U.S.C. § 300aa-12(d)(4)(B), however, the parties may object to the Decision’s inclusion of certain kinds of confidential information. Specifically, under Vaccine Rule 18(b), each party has fourteen days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, the whole Decision will be available to the public. *Id.*

² The Vaccine Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758, codified as amended at 42 U.S.C. §§ 300aa-10 through 34 (2012) (“Vaccine Act” or “the Act”). Individual section references hereafter will be to § 300aa of the Act (but will omit that statutory prefix).

Petitioner was previously granted in December 2021 an interim award of fees totaling \$125,335.73, for all work performed on the matter through the October 2021 hearing. (ECF No. 63). Petitioner has now filed a Motion for a Final Award of Attorney's Fees and Costs. Motion, dated Sept. 26, 2022 (ECF No. 79). Petitioner requests a total of \$25,941.08 (\$25,264.50 in fees, plus \$676.58 in costs) for the work of attorneys Andrew Downing, Ann Allison, and Courtney Jorgenson, plus a paralegal, for the work performed on the matter from October 2021 to the present. ECF No. 79 at 2, 4. Respondent reacted to the fees request on September 26, 2022. *See* Response, dated Sept. 26, 2022 (ECF No. 80). Respondent is satisfied that the statutory requirements for an attorney's fees and costs award are met in this case but defers the calculation of the amount to be awarded to my discretion. *Id.* at 2–3.

For the reasons set forth below, I hereby **GRANT IN PART** Petitioner's motion, awarding fees and costs in the total amount of **\$25,698.08**.

ANALYSIS

I. Petitioner's Claim had Reasonable Basis

Although the Vaccine Act only guarantees a reasonable award of attorney's fees and costs to *successful* petitioners, a special master may also award fees and costs in an unsuccessful case if: (1) the "petition was brought in good faith"; and (2) "there was a reasonable basis for the claim for which the petition was brought." Section 15(e)(1). I have in prior decisions set forth at length the criteria to be applied when determining if a claim possessed "reasonable basis" sufficient for a fees award. *See, e.g., Sterling v. Sec'y of Health & Hum. Servs.*, No. 16-551V, 2020 WL 549443, at *4 (Fed. Cl. Spec. Mstr. Jan. 3, 2020). Importantly, establishing reasonable basis does not *automatically* entitle an unsuccessful claimant to fees, but is instead a threshold obligation; fees can still thereafter be limited, if unreasonable, or even denied entirely.

A claim's reasonable basis³ must be demonstrated through some objective evidentiary showing. *Cottingham v. Sec'y of Health & Hum. Servs.*, 971 F.3d 1337, 1344 (Fed. Cir. 2020) (citing *Simmons v. Sec'y of Health & Hum. Servs.*, 875 F.3d 632, 635 (Fed. Cir. 2017)). This objective inquiry is focused on the *claim* itself—counsel's conduct in prosecuting the claim is irrelevant (although it may bulwark good faith). *Simmons*, 875 F.3d at 635. Reasonable basis inquiries are not static—they evaluate not only what was known at the time the petition was filed, but also take into account what is learned about the evidentiary support for the claim as the matter progresses. *Perreira v. Sec'y of Health & Hum. Servs.*, 33 F.3d 1375, 1377 (Fed. Cir. 1994) (upholding the finding that a reasonable basis for petitioners' claims ceased to exist once they had reviewed their expert's opinion, which consisted entirely of unsupported speculation).

³ Because this claim's good faith is not in dispute, I do not include a discussion of the standards applicable to that fees prong.

The standard for reasonable basis is lesser (and thus inherently easier to satisfy) than the preponderant standard applied when assessing entitlement, as cases that fail can still have sufficient objective grounding for a fees award. *Braun v. Sec’y of Health & Hum. Servs.*, 144 Fed. Cl. 72, 77 (2019). The Court of Federal Claims has affirmed that “[r]easonable basis is a standard that petitioners, at least generally, meet by submitting evidence.” *Chuisano v. Sec’y of Health & Hum. Servs.*, 116 Fed. Cl. 276, 287 (Fed. Cl. 2014) (internal quotations omitted) (affirming special master). The factual basis and medical support for the claim is among the evidence that should be considered. *Carter v. Sec’y of Health & Hum. Servs.*, 132 Fed. Cl. 372, 378 (Fed. Cl. 2017). Under the Vaccine Act, special masters have “maximum discretion” in applying the reasonable basis standard. *See, e.g., Silva v. Sec’y of Health & Hum. Servs.*, 108 Fed. Cl. 401, 401–02 (Fed. Cl. 2012).⁴

Here, although Petitioner’s claim was ultimately unsuccessful, I find there was sufficient objective basis to entitle her to a fees and costs award. The claim offered a reasonably-sound medical concept to support the causation theory. Petitioner’s good faith arguments were backed by support in the medical records, which reveal she did experience injuries akin to what is alleged in the post-vaccination timeframe, and also fairly-disputed fact issues about the nature of her illness. Thus, even though I did not find Petitioner’s theory overall to be persuasive or reliably-established, it had an underlying objective basis. Accordingly (and because I find no other reason to deny fees despite the claim’s disposition), a final award of fees and costs in this matter is appropriate.

II. Calculation of Fees

Determining the appropriate amount of the fees award is a two-part process. The first part involves application of the lodestar method—“multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.” *Avera v. Sec’y of Health & Hum. Servs.*, 515 F.3d 1343, 1347–48 (Fed. Cir. 2008) (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). The second part involves adjusting the lodestar calculation up or down to take relevant factors into consideration. *Id.* at 1348. This standard for calculating a fee award is considered applicable in most cases where a fee award is authorized by federal statute. *Hensley v. Eckerhart*, 461 U.S. 424, 429–37 (1983).

An attorney’s reasonable hourly rate is determined by the “forum rule,” which bases the proper hourly rate to be awarded on the forum in which the relevant court sits (Washington, D.C., for Vaccine Act cases), *except* where an attorney’s work was not performed in the forum and there is a substantial difference in rates (the so-called “*Davis* exception”). *Avera*, 515 F.3d at 1348 (citing *Davis Cty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. U.S. Envtl. Prot.*

⁴ *See also Chuisano*, 116 Fed. Cl. at 285 (cautioning against rigid rules or criteria for reasonable basis because they would subvert the discretion of special masters and stating that an amorphous definition of reasonable basis is consistent with the Vaccine Act as a whole).

Agency, 169 F.3d 755, 758 (D.C. Cir. 1999)). A 2015 decision established the hourly rate ranges for attorneys with different levels of experience who are entitled to the forum rate in the Vaccine Program. *See McCulloch v. Sec’y of Health & Hum. Servs.*, No. 09-293V, 2015 WL 5634323, at *19 (Fed. Cl. Spec. Mstr. Sept. 1, 2015).

Petitioner requests the following rates for his attorneys and support staff, based on the years work was performed:

Attorney	2021	2022
Ann Allison (Attorney)	-	\$415.00
Andrew Downing (Attorney)	\$385.00	\$445.00
Courtney Jorgenson (Attorney)	\$325.00	\$345.00
Paralegal	\$135.00	\$155.00

ECF No. 79 at 4.

Mr. Downing, Ms. Jorgenson, and Ms. Allison practice in Phoenix, Arizona—a jurisdiction that has been deemed “in forum,” and thus entitling these attorneys to commensurate rates established in *McCulloch*. *See Rich v. Sec’y of Health & Hum. Servs.*, No. 12-742V, 2017 WL 1435879 (Fed. Cl. Spec. Mstr. Mar. 28, 2017). The requested rates for Mr. Downing and Ms. Jorgenson in 2021 are also consistent with what has previously been awarded for their time, in accordance with the Office of Special Masters’ fee schedule⁵ And I find no reason to reduce any time billed to the matter, as reflected in the filed invoices.

It appears, however, that the requested 2022 rates are inconsistent with what has previously been awarded to Mr. Downing and Ms. Jorgenson. *See Einweck v. Sec’y of Health & Hum. Servs.*, No. 20-559V, 2022 WL 3011016 (Fed. Cl. Spec. Mstr. June 24, 2022); *Thoma v. Sec’y of Health & Hum. Servs.*, No. 19-1848V, 2022 WL 3573421 (Fed. Cl. Spec. Mstr. July 14, 2022) (awarding rates of \$415.00 and \$325.00 for time billed in 2022). Instead, the requested rates envision a mid-year increase, ranging between \$20.00 to \$30.00 for both attorneys. Although the size of the proposed increase is not *per se* objectionable, it is not the practice of the OSM to afford mid-year rate increases to attorneys under any circumstances.

⁵ OSM Attorneys’ Forum Hourly Rate Fee Schedules, <https://www.uscfc.uscourts.gov/node/2914> (last visited Oct. 26, 2022).

Accordingly, I will compensate Mr. Downing and Ms. Jorgenson for time devoted to the matter in 2022 at rates of \$415.00 and \$325.00, respectively. This results in a reduction of \$243.00—meaning that Petitioner will receive a total of \$25,698.08 in attorney’s fees.

III. Calculation of Attorney’s Costs

Just as they are required to establish the reasonableness of requested fees, petitioners must also demonstrate that requested litigation costs are reasonable. *Presault v. United States*, 52 Fed. Cl. 667, 670 (2002); *Perreira v. Sec’y of Dep’t of Health & Hum. Servs.*, 27 Fed. Cl. 29, 34 (1992). Reasonable costs include the costs of obtaining medical records and expert time incurred while working on a case. *Fester v. Sec’y of Health & Hum. Servs.*, No.10-243V, 2013 WL 5367670, at *16 (Fed. Cl. Spec. Mstr. Aug. 27, 2013). When petitioners fail to substantiate a cost item, such as by not providing appropriate documentation to explain the basis for a particular cost, special masters have refrained from paying the cost at issue. *See, e.g., Gardner-Cook v. Sec’y of Health & Hum. Servs.*, No. 99-480V, 2005 WL 6122520, at *4 (Fed. Cl. Spec. Mstr. June 30, 2005).

Petitioner seeks \$676.58 in costs, including postage, medical record retrieval costs, and costs associated with ordering the transcript. Such costs are typical in the Vaccine Program and are thus eligible for reimbursement and I do not find any of the amounts at issue questionable. Thus, they shall also be awarded in full without reduction.

CONCLUSION

Based on the foregoing, and in the exercise of the discretion afforded to me in determining the propriety of a final fees award, I **GRANT IN PART** Petitioner’s Motion for Attorney’s Fees and Costs, and award a total of \$25,698.08, reflecting \$25,021.50 in attorney’s fees and \$676.58 in costs, in the form of a check made jointly payable to Petitioner and her attorney, Mr. Andrew Downing.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court **SHALL ENTER JUDGMENT** in accordance with the terms of this Decision.⁶

IT IS SO ORDERED.

/s/ Brian H. Corcoran
Brian H. Corcoran
Chief Special Master

⁶ Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment if (jointly or separately) they file notices renouncing their right to seek review.